BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RACHEL A. ECKLUND	)	
Claimant	)	
	)	
VS.	)	
	)	
BANK OF AMERICA	)	
Respondent	)	Docket No. 1,019,310
	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance company requested review of the August 26, 2005 Award by Administrative Law Judge John D. Clark. The Board heard oral argument on December 20, 2005.

APPEARANCES

David M. Bryan, of Wichita, Kansas, appeared for the claimant. Eric T. Lanham, of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found claimant suffered bilateral carpal tunnel syndrome and had been working in an accommodated position when she was laid off in an economic reduction of work force by respondent. The ALJ found, therefore, that claimant was entitled to a permanent partial disability based on a work disability pursuant to K.S.A. 44-510e. The ALJ found the ratings and restrictions placed upon claimant by Dr. Pedro Murati were more reasonable than those placed on her by Dr. J. Mark Melhorn. The ALJ reviewed the task list reviewed by Dr. Murati and found that by eliminating all duplicative tasks, the number of tasks claimant had performed in the 15 years before her injury was 12. Unfortunately, he did not explain how he arrived at this number, nor did he identify the

12 tasks. The ALJ found that the only task eliminated by Dr. Murati's restrictions was the use of a keyboard on a computer. Accordingly, the ALJ found that claimant had an 8 percent task loss. The ALJ also found that claimant had made a good-faith effort to become re-employed and was entitled to a wage loss of 100 percent. Claimant's task loss and wage loss converted to a work disability in the amount of 54 percent.

The respondent and its insurance carrier (respondent) request review of the nature and extent of disability. Respondent argues claimant's disability award should be confined to her percentage of functional impairment because she returned to work in an unaccommodated job earning a comparable wage and performing all her job duties until she was laid off due to a reduction in respondent's work force. Respondent also asserts that claimant's injury should be viewed as two scheduled injuries versus an injury to the body as a whole. In the alternative, if the Board finds claimant is entitled to a work disability, respondent contends claimant showed a lack of good faith in her job search so that a wage should be imputed in calculating her percentage of wage loss.

Claimant argues the ALJ's Award should be amended to reflect a task loss of 23 percent to 36 percent based the testimony of Jerry Hardin. Claimant requests that all other findings and rulings made by the ALJ in the Award be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant began working for respondent on November 2, 1998, in the call center receiving calls and looking up information on the computer. She testified she was making $625 per week. In January 2002, both her wrists started hurting. She testified that typing seemed to cause the pain. She told her employer and was sent to Dr. Daniel Lygrisse. Dr. Lygrisse gave her a simple wrist splint and prescribed physical therapy but did no testing. Claimant next went to Dr. George Lucas, who treated her with injections to her wrists. Claimant did not like Dr. Lucas so she requested a different treating doctor, and she was referred to Dr. Prince Chan. Dr. Chan gave her Spica splints, sent her to physical therapy and ordered a nerve conduction test (NCT). Claimant testified she wore the splints to work sometimes but got blisters from them. Claimant saw Dr. Chan a second time in April 2002, when he recommended she alternate work tasks, perform stretching exercises, take breaks and use ice on her hands.

Because respondent changed insurance companies, claimant did not receive treatment for her wrists from April 2002 until she again saw Dr. Chan in April 2003. She had been working at her regular job but stated that her hands were constantly numb. Dr. Chan recommended surgery but told claimant he did not know if surgery would help. Claimant opted not to have surgery, and she said after that, no one at respondent's insurance carrier would return her calls and she could not get any more appointments.

Claimant's last day of work was August 25, 2004. At the time she was still having problems with her hands and wrists. She testified that respondent had accommodated her by supplying her with a gel wrist pad, an electric stapler and an electric clipboard. She said respondent required her to take medical leave under FMLA so she could go to her doctor and physical therapy appointments without losing her job. Also, four or five times a day, after typing for a long period, claimant was allowed to stop, rest and stretch for five to ten minutes. A couple times a day she would ice her hands, and she wore splints at times. She testified that all of this affected her output at work. Nevertheless, she testified that if she had not been laid off, she would still be working for respondent. However, she did not think she could have done the job within Dr. Murati's restrictions.

After her lay-off, claimant filed for unemployment and began looking for another job. In order for the unemployment benefits to continue, claimant was required to submit two job applications per week, which she did. She claims she applied for every type of job she thought she was qualified for, even those requiring typing, although she did not think she could work at a job requiring her to type, as even typing a résumé caused her wrists to start hurting. She found potential jobs through the newspaper, online employment services and word of mouth and usually applied for the jobs by submitting résumés. At the time of the Regular Hearing, she had only had a couple of interviews.

Claimant was examined by Dr. Pedro Murati, a physiatrist, on October 12, 2004, at the request of claimant's attorney. At that time, she complained of pain and numbness in both hands and wrists and pain in both elbows. In Dr. Murati's report, he indicated that claimant had carpal tunnel releases on both hands; however, he supplemented his report with a letter correcting this error and acknowledging that claimant never underwent bilateral carpal tunnel release. After reviewing claimant's medical records and examining her, Dr. Murati diagnosed her with bilateral carpal tunnel syndrome, which he opined was a direct result of her work-related injury.

Dr. Murati stated that he recommended claimant have carpal tunnel release surgeries. His restrictions on claimant were that she do no heavy grasping, grabbing, pushing or pulling greater than 35 pounds. She should use wrist splints while working and at home. He also restricted her from use of hooks or knives for both hands, no use of vibratory tools and recommended only occasional grasping and grabbing and avoid frequently performing repetitive hand controls. In his original report, Dr. Murati did not restrict claimant from keyboarding, but corrected this error in a letter to claimant's attorney dated March 11, 2005, where he stated that claimant "should only type for 20 minutes with 40 minute breaks in between."[1]

[1]Murati Depo., Ex. 2 at 5.

Dr. Murati rated claimant, using the AMA *Guides*[2], giving claimant a 10 percent right upper extremity impairment, which converts to a 6 percent whole person impairment. He also rated claimant as having a 10 percent left upper extremity impairment, which converts to a 6 percent whole person impairment. The whole person impairments combined for a 12 percent whole person impairment.

Dr. Murati reviewed a work task list prepared by Jerry Hardin. Of the 22 tasks on the list that Mr. Hardin had marked as nonduplicative, Dr. Murati opined that claimant could no longer do 5 of them, for a task loss of 23 percent.

Dr. J. Mark Melhorn is board certified in orthopedic surgery. He first saw claimant on December 17, 2004. Claimant was sent to him by respondent for an assessment and, if appropriate, medical intervention. Dr. Melhorn testified that he interpreted the results of claimant's first NCT to indicate that claimant had a nerve dysfunction that was not far enough into the range to actually be diagnosed as carpal tunnel syndrome. He diagnosed claimant with painful right and left hands and wrists and recommended another NCT. That NCT, which was performed in December 2004, indicated that sensory latency on the right showed claimant had carpal tunnel syndrome. Claimant's left was in a normal pattern, but at the end of the range, suggesting carpal tunnel syndrome.

Dr. Melhorn's records indicate that claimant was not working and that her symptoms persisted, which he said indicated multiple causation with regard to etiology. He suggested to claimant that surgical intervention would be a reasonable option for her, but she indicated that her symptoms were not overwhelming, that she had made modifications of activities and felt she had improved. Dr. Melhorn told her to continue her exercises, stretching and heating and cooling her hands. On January 10, 2005, Dr. Melhorn released claimant to regular work with a restriction of task rotation and no use of vibratory tools.

Dr. Melhorn rated claimant, based on the AMA *Guides*, and stated she had no impairment. Dr. Melhorn stated that according to the AMA *Guides*, "if an individual has a nerve entrapment and/or a carpal tunnel component and management as provided and the workplace is modified and the individual's symptoms are reduced, then based on the guides there's no impairment."[3] Dr. Melhorn stated that if he were able to use the Fifth Edition of the AMA *Guides*, he would have found claimant to have a 5 percent impairment to the right upper extremity. He would find no impairment of the claimant on the left. Dr. Melhorn testified that using the Fourth Edition, an impairment could have been found if the claimant had surgery with permanent function loss. Dr. Melhorn stated that claimant had symptoms but no function loss because on her last visit her symptoms were improving. At the time of his last examination, claimant had not worked for almost five months.

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[2]American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[3] Melhorn Depo. at 17.

Dr. Melhorn reviewed the task list of Gary Weimholt and stated that of the 21 tasks on the list, he had concerns about two of them. One of those was No. 12, entering catalog orders into a computer. The other was No. 16, entering credit card purchases into a computer. Concerning No. 12, Dr. Melhorn stated that if claimant was able to rotate that activity, she could do that activity. Concerning No. 16, he said if claimant only did this activity once a month, it would not be considered a repetitious activity. Assuming that task rotation is a part of the job activities, Dr. Melhorn opined that claimant had no task loss.

Dr. Melhorn also reviewed the task list prepared by Jerry Hardin but would not give an assessment of task loss because he found Mr. Hardin's list difficult to interpret and the questions difficult to answer.

Dr. Melhorn testified he believed claimant could work on a computer keyboard for 45 to 50 minutes and then work 2 to 5 minutes at an alternative activity. He testified that no good prospective study shows that performing data entry for hours at the keyboard causes carpal tunnel syndrome, although that activity could contribute to or aggravate the condition of an at-risk person.

Gary Weimholt, a vocational rehabilitation consultant, interviewed claimant by telephone on April 15, 2005. In visiting with claimant, Mr. Weimholt prepared a list of 21 tasks claimant performed over the 15 years before her injury. Considering her age and stable work experience, Mr. Weimholt believed claimant would be a good candidate for employment. He testified claimant is qualified in clerical and administrative areas, customer service and perhaps sales.

Mr. Weimholt visited with claimant about her job search. Claimant advised him she was applying for jobs by using internet applications or internet résumés, with the exception of one job at Intrust Bank, where she submitted a résumé in person. He said she had not applied for any jobs in medical offices, real estate offices, hotels, insurance companies or insurance agencies, but her list does contain some of these type of employers.[4] Mr. Weimholt believed that claimant relied too heavily upon placing résumés and internet applications, which are low outcome job search methods. He testified that if claimant made a more aggressive search to find employment, she could be expected to earn somewhere between $10 and $11 per hour in a job that would be within Dr. Murati's restrictions. If these hourly wages were imputed, they would compute to a wage loss of 36 percent and 30 percent respectively.

Mr. Hardin visited with claimant in person on November 15, 2004, at the request of claimant's attorney. He prepared a task list containing a total of 55 tasks and 22 what he termed nonduplicative tasks that she performed in the 15-year period before the date of accident. He also stated that since claimant was not working at the time he saw her, she had a 100 percent wage loss. Unfortunately, Mr. Hardin was not asked to give his opinion

[4]R. H. Trans., Cl. Ex. 2.

concerning the propriety of claimant's job search, nor was he asked what wage claimant retained the capacity to earn.

Respondent argues that claimant cannot receive a work disability award (an amount greater than her percentage of functional impairment) because she returned to an unaccommodated job and did not leave work because of her injury. This argument fails as a question of fact because claimant was accommodated. It fails as a question of law because returning to an unaccommodated job does not preclude a work disability.[5] Respondent's argument that claimant's upper extremity injuries should be treated as two scheduled injuries rather than as a general body disability raises a more interesting and closer question.

The Workers Compensation Act recognizes two classes of injuries other than those which result in death or total disability, and those are permanent disability to a scheduled part of the body and permanent partial general disability.[6] "When a specific injury and disability is a scheduled injury under the Workmen's Compensation Act, the benefits provided under the schedule are exclusive of any other compensation."[7] K.S.A. 44-510c(a)(2) has been extended by case law to allow compensation for certain combination injuries to be based on permanent partial disability.[8]

In *Murphy*[9]*,* the Supreme Court held that simultaneous aggravation to both arms and hands through repetitive use removes the disability from a scheduled injury and converts it to a general disability. "Where a claimant's hands and arms are simultaneously aggravated, resulting in work-related injuries to both hands and arms, the injury is compensable as a percentage of disability to the body as a whole under K.S.A. 44-510e."[10]

In *Honn,* the Supreme Court noted that the schedule of injuries found at R.S. Supp. 1930, 44-510(3)(c)(1) to (20) failed "to provide compensation for both members when they are in pairs."[11] The court then analogized to the permanent total statute and concluded that "when two feet are injured, as in the case before us, the compensation should not be

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[5] *Roskilly v. Boeing Co.*, __ Kan. App. 2d __, 116 P.3d 38 (2005).

[6] *See* K.S.A. 44-510d; K.S.A. 44-510e.

[7] *Berger v. Hahner, Foreman & Cale, Inc.*, 211 Kan. 541, 545, 506 P.2d 1175 (1973).

[8] *See Hardman v. City of Iola*, 219 Kan. 840, 844, 549 P.2d 1013 (1976); *Downes v. IBP, Inc.*,10 Kan. App. 2d 39, 691 P.2d 42 (1984), *rev. denied* 236 Kan. 875 (1985).

[9] *Murphy v. IBP, Inc.*, 240 Kan. 141, 727 P.2d 468 (1986)

[10] *Id.* at 145; *see also Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, Syl. ¶ 1, 947 P.2d 1 (1997).

[11] *Honn v. Elliott*, 132 Kan. 454, 458, 295 Pac. 719 (1931).

computed for each one separately, as for the injury to one foot as provided by the schedule, but should be computed [as a body as a whole injury]."[12] K.S.A. 44-510c(a)(2) has been amended since *Honn* and now provides, in relevant part, "[l]oss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability."

Finally, in *Pruter,*[13] the Kansas Supreme Court reaffirmed the applicability of the *Honn* rule to the loss of use of parallel limbs that caused substantial impairments. While *Pruter* dealt with simultaneous injuries from a single accident, the Board believes the rule is likewise applicable to a series of accidents, especially where repetitive trauma injuries are treated as a single accident.[14]

The Board finds the Supreme Court's analysis in *Pruter*, coupled with the language of K.S.A. 44-510c(a)(2), requires an award based upon a general body disability and not two separate scheduled injuries under K.S.A. 44-510d.

The Board is not unmindful of the language respondent relies upon in *Markovich*[15] which indicated that *Pruter* says the *Honn* exception was only applicable to the loss of use of parallel limbs where simultaneous injuries caused substantial impairments. However, *Pruter* did not contain such a holding. Furthermore, *Pruter* is factually distinguishable because that case involved an acute injury to extremities on the same side. In this case, the injuries were repetitive and occurred to both parallel extremities. In addition, claimant's pain, permanent work restrictions and task loss constitute substantial impairment, not only to her ability to function, but also to her ability to obtain and retain employment.

Moreover, a substantial impairment is obviously recognized in parallel extremity injuries in the first instance because in the absence of proof to the contrary, injuries to parallel extremities are presumed to constitute a permanent total disability.[16] And *Honn* noted that at no place in the scheduled disability statute does it provide for compensation for loss of use of both parallel members. Therefore, if the evidence establishes that the injury to both parallel members does not result in permanent total disability then, because the schedule does not provide for loss of use of both parallel members, the injury must be compensated based upon a permanent partial disability pursuant to K.S.A. 44-510e which specifically provides the method to compensate for injuries not covered by the schedule in

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[12] *Id.*

[13] *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

[14] *See Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, 947 P.2d 1 (1997); and *Casco v. Amour Swift-Eckrich*, __ Kan. App. 2d __, __ P.3d __ (Dec. 19, 2005) (2005 WL 3462748 Kan. App.).

[15] *Markovich v. Orion Fittings, Inc.*, No. 91,248, unpublished Kansas Court of Appeals opinion filed October 8, 2004 (2004 WL 2282116 Kan. App.).

[16] K.S.A. 44-510c(a)(2).

K.S.A. 44-510d. That statutory analysis in *Honn* was the basis for determination that parallel extremity injuries could not be compensated as two separate scheduled disabilities. Stated another way, because the schedule in K.S.A. 44-510d does not provide for loss of use of both parallel members, if simultaneous injuries to parallel extremities do not result in permanent total disability, then such injuries must be compensated pursuant to K.S.A. 44-510e.[17]

Permanent partial disability under K.S.A. 44-410(a) is defined as the average of the claimant's work tasks loss and wage loss. But, it must first be determined that a worker has made a good faith effort to find appropriate employment before the difference in pre- and post-injury wages based on the actual wages can be used. If it is determined that a good faith effort has not been made, then an appropriate post-injury wage will be imputed based on all the evidence, including expert testimony concerning the capacity to earn wages.[18] The Board finds that claimant has demonstrated a good faith effort to find appropriate employment. Although she could reasonably be expected to expand her job search to additional areas of employment and thereby likewise expand the number of contacts she makes per week with prospective employers, her testimony, coupled with her list of the job contacts she has made, establishes a good faith effort. Claimant has a tenth grade education and a GED. She has had no formal vocational training. Many of her job skills cannot be transferred to another job due to her restrictions. It appears that claimant would benefit from professional job placement assistance or a vocational rehabilitation plan.

In this case, the Board agrees with the ALJ's conclusion that the functional impairment, work restrictions and task loss opinions of Dr. Murati are more credible than those given by Dr. Melhorn. The Board adopts those findings and conclusions of the ALJ but with one exception. The ALJ said he was utilizing the task list prepared by Mr. Hardin and the task loss opinion given by Dr. Murati but he did so with some modifications. The Board is unable to determine how the ALJ arrived at his number of nonduplicative tasks. The Board will instead accept the testimony of Mr. Hardin that his list contains 22 nonduplicative tasks. Dr. Murati considered those 22 tasks in arriving at his opinion that claimant has lost the ability to perform 5 of the 22, for a task loss of 23 percent. Averaging the 23 percent task loss with the 100 percent wage loss results in a work disability of 61.5 percent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated August 26, 2005, should be and is hereby modified as follows:

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[17] *Cf. Mathena v. IBP, Inc.*, 33 Kan. App. 2d 956, 111 P.3d 182 (2005), where simultaneous injuries were treated as separate schedule injuries because they were not identical and therefore not parallel .

[18] *Copeland v. Johnson Group, Inc.*, 26 Kan. App. 2d 803, 995 P.2d 369 (1999), *rev. denied* 269 Kan. 931 (2000).

The claimant is entitled to permanent partial disability compensation at the rate of $416.69 per week not to exceed $100,000 for a 61.5 percent work disability.

As of January 3, 2006, there would be due and owing to the claimant 70.86 weeks of permanent partial disability compensation at the rate of $416.69 per week in the sum of $29,526.65 for a total due and owing of $29,526.65, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $70,473.35 shall be paid at the rate of $416.69 per week until fully paid or until further order from the Director.

The claimant's contract with his attorney for the payment of fees and expenses is approved subject to the provisions of K.S.A. 44-536.

All other findings, conclusions and orders contained within the ALJ's Award are hereby affirmed to the extent they are not inconsistent with the above findings, conclusions and orders of the Board.

IT IS SO ORDERED.

Dated this _____ day of January, 2006.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: David M. Bryan, Attorney for Claimant
Eric T. Lanham, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

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	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE CO.	)	
Insurance Carrier	)	

ORDER NUNC PRO TUNC

The Board has been made aware of an error in its Order entered in this case on January 6, 2006, in the first sentence of the first full paragraph on page 8. That sentence is corrected to read:

> Permanent partial disability under K.S.A. 44-510e(a) is defined as the average of the claimant's work tasks loss and wage loss.

All other statements, findings and conclusions in the Board's Order shall remain as originally stated.

IT IS SO ORDERED.

Dated this _____ day of February, 2006.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: David M. Bryan, Attorney for Claimant
Eric T. Lanham, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director